Case No. 82-5909

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY RAY PEEK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

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QUESTION PRESENTED

Whether Florida's procedural rule which denies a death-sentenced defendant the opportunity to present substantial new evidence after trial either towards guilt or sentence, which did not exist and was not available at the time of trial, unless the Florida Supreme Court first determines that the new evidence would "conclusively" have prevented the conviction, violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is an order denying Petitioner's request for leave to file a petition for error coram nobis. It is reproduced in the appendix as Item 3 (A46).

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on September 9, 1982 (A46). Petitioner filed a Motion for Rehearing (A47-A50) which was denied on November 16, 1982 (A51). Petitioner asserted below and asserts here a depravation of his rights as guaranteed under the United States Constitution. Title 28, United States Code, Section 1257(3), and Rule 17 of the United States Supreme Court Rules confer certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. The Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. The Fourteenth Amendment to the United States Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner was sentenced to death on May 2, 1978. The conviction and sentence were affirmed by a five-two margin of the Florida Supreme Court in Peek

v. State, 395 So.2d 492 (Fla. 1980), cert. denied, 101 S.Ct. 2036 (1981) (attached as Appendix A1 - A15). On June 23, 1982, Petitioner filed a request for leave to file a petition for writ of error coram nobis in the trial court (attached as A16 - A45), which was denied by the Florida Supreme Court without opinion, over two dissents (attached hereto as A46). The request was accompanied by two pieces of substantial new evidence, neither of which existed at the time of trial, and which substantially altered the weight of the evidence against Petitioner. Petitioner contends that if he is permitted to present this new evidence, neither the judgment nor sentence could stand. A rehearing petition (A47-A50) was denied by the Florida Supreme Court on November 16, 1982 (attached as Appendix A51).

STATEMENT OF THE FACTS

The State presented three pieces of evidence incriminating Petitioner at trial:

1. Blood and seminal fluid stains taken from the victim's pajamas indicated the presence of type "O" secretor blood. According to the trial testimony, 33% of the population has type "O" secretor blood, including both the victim and Petitioner.

2. The victim's car was found the day after the crime at a park approximately one mile from her residence, and near her place of employment. Numerous fingerprints were found inside the car, including one on the window that matched Petitioner's. Petitioner testified that, the morning after the crime, he saw the unlocked car while eating breakfast in the park at which the car was found, and he decided to "look around." However, he testified that there was nothing worth taking, and he left. This fingerprint explains how Petitioner became a suspect in the crime. It was the only positive evidence linking Petitioner to anything having to do with the victim, although it does not link him to the crime itself.[1]

1/ Petitioner's explanation was rebutted by Officer Donnelly who testified that Petitioner had previously told him that he (Petitioner) "had not been in the vicinity of the lakeside park (where the car was parked)." This seeming inconsistency is easily explained by the fact that Petitioner was new to the area and did not know the names of different areas. Thus, when Petitioner was asked at trial where he went after breakfast on the morning after the murder, he responded "a lake" (R-673). When asked, "What lake?", he said, "I don't know, you know, one from the other, because, you know, I am not from Florida." So, when Petitioner told the police officer that he had not been to that area referred to, he thought he was being truthful: he had been there, he simply did not know the name of the particular lake to which the officer referred (there are numerous lakes in Polk County).

3. A piece of stocking containing a single fragment of a strand of negroid hair was found on the floor of the garage of the victim's home (although the victim's body was found in the bedroom). An employee from the Florida Department of Law Enforcement testified that hair samples obtained from Petitioner were microscopically consistent in appearance with the fragment found in the stocking. Nobody testified to the whereabouts of the hair for the six months preceding the comparison. Immediately after the comparison, the samples were "lost," and the defense could not inspect them. The analyst futher testified, as noted by the Florida Supreme Court in its opinion, that "various studies by many persons now working in my field have determined that there is probably no more than two people out of every ten thousand persons who will exhibit exactly the same characteristics in their hairs" (R-453). Based upon documents authored by the analyst's supervisors, we now know that the hairs examined were probably mixed up, and that the comparison was incorrectly done. Also, based upon recent scientific developments, we now know that the statistics relied upon are "grossly in error."

Petitioner presented an alibi defense which consisted of the records of the State's halfway house, where Petitioner resided at the time of the crime, indicating that a bed check was made on the night of the crime and that all residents, including Petitioner, were "present or accounted for." Although the Assistant Director of the halfway house could not positively state that Petitioner was present because he could have been out on authorized leave and, therefore, be "accounted for", Petitioner testified that he was on restriction that evening because he was unemployed and was not permitted to leave the house.

The majority of the Florida Supreme Court summarized the facts of this case as follows:

> The case against [Petitioner] is concededly circumstantial. But we are satisfied that, when considered in combination, the evidence relating to the matching fingerprint, the hair comparison, and the blood and semen analysis, enabled the jury to reasonably conclude that [Petitioner's] guilt was proven beyond a reasonable doubt.

395 So.2d at 495. (A4) Justices Sundberg and England dissented, declaring that the evidence did not prove Respondent's guilt beyond a reasonable doubt. As they explained (A13):

> The hair, blood and semen analysis, coupled with the fingerprint found on the victim's automobile are simply insufficient to support the conviction, in view of the statistical probability of the occurrence of

like type hair, blood and semen in the population, and the inability of the State to establish that the fingerprints were placed on the automobile at the time the crime was committed.

Because the fingerprint on the victim's automobile was explained, and because the blood and semen could have come from at least one third of the population, the linchpin of the State's case was the hair evidence and the statistical probability of two hairs matching. The jury undoubtedly gave the "statistical probability" testimony great weight. The prosecutor attached considerable significance to it, and argued it strenuously in his closing argument (R-722-725). Similarly, the State also relied heavily on these statistical probabilities in its brief filed with the Florida Supreme Court. This "probability evidence" was clearly the straw that broke the camel's back in this case of circumstantial evidence.

Through his request for leave to file writ of error coram nobis, Petitioner sought to present two pieces of newly discovered evidence which totally destroys the hair evidence and probability statistics presented at trial. First, some months after the trial, the hair examiner resigned after receiving an unusually poor employee evaluation. Upon rating the analyst as "unsatisfactory" in evidence handling (A28), the evaluation states:

> Evidence Handling
>
> Evidence handling is one of Ms. Bass' most problematical areas. She does not appear to have the proper conception of the very special nature of evidentiary items and the problems that could be created when the integrity of the evidence is questioned. On many occasions it was noted that items of evidence containing potential trace evidence were left in an uncovered condition on a laboratory table top overnight. This failure to protect the items by repackaging them when not actually involved in the analysis leaves a VERY STRONG PROBABILITY OF EXTRANEOUS CONTAMINATION, CROSS-CONTAMINATION AMONG ITEMS, and possible loss of trace evidence.[2]
>
> Ms. Bass fails to realize that the integrity of the evidence must be maintained even after the laboratory examination is complete. In a recent case, Ms. Bass conducted a paint comparison between an automobile fender and a bumper. At the conclusion of her laboratory examination, Ms. Bass stored these items of evidence outside in back of the laboratory in an unpackaged condition, and in an unprotected

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2/ This "very strong probability of extraneous contamination [or] cross-contamination" is even stronger when the subject of the analysis is hair because of the highly mobile nature of hair and the consequent serious danger of mix-up. It is entirely possible that the analyst compared one of Petitioner's hairs to another of his hairs or that one of the items compared came from another suspect, a lab employee, one of the black police officers at the scene, or one of the thousands of persons who could have left a hair on the floor of the victim's garage, such as service persons.

> area, thereby subjecting them to the frequent rains occurring at that time of year. These items quickly became dirty and rusty before she was directed to protect them by the microanalysis supervisor.

(Emphasis supplied) (A31-A32).

This new evidence raises the "very strong probability of" tampering, albeit unintentional, which is crucial in light of the fact that the location of the hair samples was unknown for the six month period beginning with its arrival at the crime lab and continuing until the analysis was performed.[3] Moreover, immediately after the analysis, the evidence was lost.

The employee evaluation also raises questions of equal seriousness regarding the analyst's abilities to perform a hair comparison:

> Job Skill Level
>
> Although Ms. Bass has approximately three years experience in the crime laboratory, her technical skills in the analysis of evidentiary materials is not commensurate with this time period. Although her skills in basic microscopy appear adequate for a first or second year microanalyst, she does not utilize the more advanced techniques that should have been acquired in three years. The fact that she uses a number of antiquated criteria for the analysis of hair, such as scale counting,[4] should be indicative of a lack of adequate background training in this area. Her general scheme for hair comparisons appears to be lacking in the detailed morphological description required for this type of examination. The failure to utilize the comparison microscope in this type of examination is considered to be a serious fault.
>
> Ms. Bass has not demonstrated the knowledge of instrumental methods of analysis usually observed in third-year microanalysts. A lack of knowledge and experience has been observed in her use of IR, PGC, AA, and other instrumental methods. The inability to choose appropriate methods of instrumental analysis and the lack of knowledge needed to completely perform these analyses should be considered an extremely serious deficiency.

(Emphasis supplied) (A30).

The analyst lost the hair immediately subsequent to testing and so there is no opportunity now to go back and demonstrate conclusively that it was not consistent with Petitioner's. However, the evaluation shows that the analyst's repeated failure to properly care for evidence, in the words of the Florida Department of Law Enforcement supervisory personnel, "leaves a very strong probability of extraneous contamination, cross-contamination

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3/ The Florida Supreme Court held that the State's failure to demonstrate the chain of custody did not prevent the admission of the analyst's testimony concerning the hair. That testimony could be excluded, according to the Court, only where the Defendant proves "probable tampering."

4/ Scale counting was the method utilized in this case.

among items, and possible loss of trace evidence." Thus, Petitioner can now show, through this evaluation, probable tampering, albeit unintentional, with the evidence. Also, Petitioner can show that the analyst did not have the abilities to perform an accurate analysis. In a study published several months after the trial, it was found that one of three inexperienced hair analysts misidentified common hair types.[5]

The second and even more crucial new evidence concerns the probability statistics. At the time of the trial, there was only one experiment in the field which purported to establish statistical probabilities for matching hair. This experiment arrived at a statistical probability of 1 in 4500 that two hairs will match. Based upon this experiment,[6] the analyst testified that "various studies by many persons[7] in my field have determined that there are probably no more than two people out of every 10,000 persons who will exhibit exactly the same characteristics in their hairs." Some months subsequent to trial, the author of this experiment significantly qualified it in further work, and conceded that the statistics would not apply to a case such as this. Then, in April, 1982, the latest and only other article on the subject concluded that the first experiment was totally incorrect:

> In the seven years that have lapsed since the publication of the first article, there has been no attempt reported in the literature to confirm Gaudette's work or criticize his treatment of the data . . . . [The experiment] claims to provide first estimates of certain probabilities useful for the individualization of human scalp and pubic hair. Unfortunately, the probability estimates are GROSSLY IN ERROR because of experimental bias and improper statistical treatment of the data . . . . The probability estimates derived by Gaudette are not relevent to hair individualization.

(Emphasis supplied) (A34). Thus, the testimony of the hair witness concerning probabilities has been completely discredited in the field and Petitioner alleged below and was prepared to prove that the witness' statistics are not relied upon by any other hair experts.

5/ Petitioner can also show that the witness was seriously mistaken in her testimony that the fragment was consistent with Petitioner's hair in 30-35 characteristics. Only 20-25 such characteristics are recognized to exist. However, this knowledge was available at the time of trial, and, admittedly, was not a proper subject for a writ of error coram nobis.

6/ Petitioner attached the analyst's affidavit to the coram nobis petition which stated that she was relying upon this experiment.

7/ This simply was not true. However, it was the duty of the public defender to cross-examine on it. He did not.

Without opinion, but over two dissents, the Florida Supreme Court denied Petitioner's request for leave to present these two crucial pieces of new evidence -- the employee evaluation and the new probability studies -- to the trial court for the purposes of either guilt or the appropriateness of the death sentence.

REASONS FOR GRANTING THE WRIT

Florida's procedural rule which denies a death sentenced defendant the opportunity to present substantial new evidence after trial either towards guilt or sentence, which did not exist and was not available at the time of trial, unless the Florida Supreme Court first determines that the new evidence would "conclusively" have prevented the conviction, violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Florida law requires that in order to present new evidence to the trial court after trial in a criminal case, a petitioner must first seek leave in the appellate court which has previously entertained an appeal from the final judgment in the case and affirmed it by its mandate. Hallman v. State, 371 So.2d 482 (Fla. 1979). The evidence must be newly discovered -- that is, it did not exist nor could it have been discovered at the time of trial. Neither the employee evaluation nor the 1982 study existed at the time of trial in this case.

Next, Florida law requires that in order to be permitted to present the new evidence, Petitioner must show that the new evidence would "conclusively prevent the entry of judgment against the Petitioner." Hallman, supra (4-3 majority opinion). Although the Florida Supreme Court did not specifically state in the instant case that its reason for denying Petitioner the relief he sought was based upon this doctrine, because the evidence did not exist at the time of trial, the only logical conclusion is that the majority of the Florida court believed that Petitioner failed to meet this requirement by alleging sufficient prejudice. It is this procedural rule of Florida which Petitioner contends violates his constitutional guarantees.

Three of the seven justices of the Florida Supreme Court have recognized the constitutional infirmity in Florida's coram nobis procedure, at least in death cases. In a partial concurrence and partial dissent in Hallman, these three justices explained:

> A death case should be an exception to the 'conclusiveness test.' In my view, the rigid application of the 'conclusiveness test' is not proper in cases where the death penalty has been imposed. As Mr. Justice Stevens said in writing for the plurality in Gardner v. Florida, 430 U.S. 349, 351 (1977), the death penalty is different from any other means of punishment, both in its severity and finality. I also believe our failure to consider these allegations on the merits at the sentencing phase will result in a weakening of our death penalty statute and could lead to a reversal of this cause under the principles expounded by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978). The majority in Lockett stated that: 'The need for treating each defendant in a capital case with that degree of respect due to uniqueness of the individual is far more important than a non-capital case is.' 438 U.S. at 605.
>
> In conclusion, the majority's mistake in this case is not allowing [the new evidence] to be considered on its merits in regard to the appropriateness of the death penalty in this cause.

Id. at 487. The view of the dissenting justices has recently been proved correct by this Court in Eddings v. Oklahoma, 50 U.S.L.W. 4161 (1982), and Green v. Georgia, 442 U.S. 95 (1979). In Eddings, this Court held that the sentencing authority must consider in mitigation any aspect of defendant's character and any of the circumstances of the offense. Clearly, where relevant and substantial new evidence exists which did not exist at the time of trial and could not reasonably have been discovered at the time of trial, and where that new evidence places in substantial doubt the correctness of the conviction and sentence, the sentencing authority must be permitted to consider that evidence, if only for the appropriateness of the sentence.

Similarly, in Green v. Georgia, 442 U.S. 95 (1979), this Court held that a state procedural rule which forbids the sentencing authority in a death case to consider relevant and reliable evidence violates the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. See Petitioner's Petition for Rehearing before the Florida Supreme Court at 3 (A49).

The constraints imposed upon state procedural rules by the Constitution were well analyzed by the Seventh Circuit in McMorris v. Israel, 643 F.2d 458, 460-61 (7th Cir. 1981). The Court there explained:

> Every state is generally free to exercise its sovereign prerogative as to the evidence it will admit in its courts. The Federal Constitution, however, imposes a limited restraint upon state evidentiary rules where exculpatory evidence is excluded by arbitrary state rules. Washington v. Texas, 388 U.S. 14 (1967). The genesis of this restriction is founded in the Defendant's Sixth Amendment right to 'compulsory process for obtaining witnesses in his favor.' The Constitution imposes this limitation because the

> state may not deny an accused in a criminal trial the right to a fair opportunity to defend against the State's accusations. Chambers v. Mississippi, 410 U.S. 284 (1973). However, 'the right of a defendant to present relevant and competent evidence is not absolute and may 'bow to accomodate other legitimate interests in the criminal trial process,' Hughes v. Mathews, 576 F.2d 1250, 1258 (7th Cir.) cert. dismissed, 439 U.S. 801 (1978) (citing Chambers, 410 U.S. at 295), although the competing state interests must be substantial to overcome the claims of the defendant. Our task is to evaluate the exculpory significance of the proffered . . . evidence and then to balance it against the competing state interests in the procedural rules that prevented the defendant from presenting this evidence . . . Government of the Virgin Islands v. Smith, 615 F.2d 964, 972 (3rd Cir. 1980).

(footnotes omitted). See also Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972); Alicea v. Gagnon, 675 F.2d 913, 923 (7th Cir. 1982).

Unquestionably, the State of Florida has an interest in the finality of its convictions. However, the numerous decisions of this Court -- Gardner, Lockett, Green, and Eddings, to name a few -- establish the well-settled proposition that imposition of the death sentence is unique, in both its severity and its finality. Prior to the imposition of a death sentence, a death sentenced individual must be permitted to present evidence which, had it been available to him at trial, there is a reasonable possibility that the death penalty would not have been imposed.

In pursuit of its interest in the finality of its convictions and sentences, Florida clearly has a right to impose a prejudice standard on a petitioner seeking to present new evidence after trial. In a motion for a new trial under Fed. R. Crim. P. 33 or under Fla. R. Cr. P. 3.600 based upon newly discovered evidence, a petitioner must show that the newly discovered evidence probably would have resulted in acquittal. Ashe v. United States, 288 F.2d 725, 733 (6th Cir. 1961); Baker v. State, 336 So.2d 364 (Fla. 1976). Where newly discovered evidence was available to the prosecutor and not submitted to the defense, a lesser standard of prejudice must be shown. United States v. Agurs, 427 U.S. 112 (1976). See also United States v. Anderson, 574 F.2d 1347, 1354 (5th Cir. 1978).[8]

8/ Where a petitioner has shown that he has been deprived the effective assistance of counsel, the Circuit Courts of Appeals are inextricably varying in the prejudice requirement. The Eleventh Circuit holds that the prejudice requirement is satisfied by demonstrating that but for his counsel's ineffectiveness, his trial, but not necessarily its outcome, would have been altered in a way helpful to him. Washington v. Strickland, 673 F.2d 879 (11th Cir. 1982). However, there seem to be nearly as many prejudice rules as there are circuits on the issue of ineffective assistance of counsel. See Washington, supra nn. 11-20.

The writ of error coram nobis is also used in the federal system to correct a grave injustice. United States v. Morgan, 346 U.S. 502 (1954). When a coram nobis claim is made, a petitioner is entitled to a hearing upon it unless the face of the petition clearly shows that he is entitled to no relief, United States v. Taylor, 648 F.2d 565 (9th Cir. 1981); Quensby v. United States, 353 F.2d 412, 417 (10th Cir. 1965), cert. denied, 383 U.S. 962 (1966), a standard precisely opposite of Florida's. At the hearing, the case law seems to suggest that a petitioner has the burden of proof, which, if met, shifts to the government to show that the error was harmless. E.g., United States v. Gross, 614 F.2d 365 (3rd Cir. 1980).

Despite the general confusion and differing views of the federal courts on the standard of prejudice which must be shown before post-conviction relief may be obtained because the trial was tainted, no court, other than the Florida Supreme Court holds that a petitioner must meet the ultimate burden of conclusiveness in order to be entitled to a hearing to present his claim. Such a strict prejudice standard is unconstitutional. The facts of this case show how strictly that standard is applied in Florida and demonstrate its unconstitutionality.

This issue takes on added significance in light of the recent trend of trial courts to admit "scientific" evidence on hair and fiber comparisons, dental comparisons, and numerous other emerging scientific areas. The art of science is a changing one. Where scientific evidence is permitted to be introduced, there must be a reasonable mechanism whereby changes in the state of the art may also be introduced. The Sixth and Fourteenth Amendments, and the Eighth Amendment in a death case, are all violated where the State's mechanism to allow the introduction of the latter state of the art requires such a severe prejudice showing so as to allow for execution where a reasonable possibility exists that the person would have been aquitted had the state of science been so advanced at the time of trial. A death penalty statute is unconstitutionally arbitrary where the same set of facts can be presented to a jury twice, and yields different results because our scientific knowledge has advanced, but there is no reasonable mechanism to present the advances in the case that was tried prior to those advances.

In this case, Petitioner submits that the new evidence is so substantial that Petitioner would not have been convicted, let alone sentenced to death, had it been available at the time of trial. After all, without the

hair evidence, the State's case consisted of a fingerprint found on a car one mile from the murder scene which was explained by Petitioner, and blood found at the scene consistent with that of the victim, the Petitioner, and one-third of the population. There seems little doubt that such evidence would be insufficient to sustain a conviction under the principles of the United States Constitution enunciated in Jackson v. Virginia, 443 U.S. 307 (1979). But at the very least, Petitioner must be given the right to present this evidence where it bears substantially on his innocence as a mitigating factor in the sentencing phase.

The distinction drawn by Florida between the prejudice that must be shown in a motion for a new trial versus a coram nobis petition is an arbitrary one. There can be no rational basis for a rule which allows new evidence under certain circumstances within ten days after trial but disallows it thereafter, where the new evidence happens to come into existence after that tenth day. No interest of the state is advanced by such a rule and where, as here, the new evidence did not exist within the ten day period, a defendant cannot be faulted for failing to find it.

The right to a full and fair state hearing to determine the validity of a death-sentenced individual's claims is denied by Florida's application of its coram nobis rule. Petitioners, including the petitioner herein, get no opportunity to present their new evidence and prove the incorrectness of the original judgment. Rather, the state appellate court usurps the decision of whether coram nobis should issue without the benefit of an evidentiary hearing or a record.

The scientific evidence at trial in the instant case concerning the probabilities of matching hairs was based on a lone experiment which has now been discredited. To deny the Petitioner the opportunity to show this is to allow a defendant to be executed based upon scientific propositions of the caliber that the world is flat, even though we learn that the world is round prior to the execution. Similarly, we now know from the analyst's employee evaluation that there is a high probability that the wrong hairs were compared and we know for certain that the analyst did not have the requisite skills to perform the analysis. A travesty of justice would occur if Petitioner is executed without according the trial court the opportunity to weigh the new evidence.

CONCLUSION

Based on all of the foregoing, Petitioner respectfully requests that this Court grant certiorari in this cause.

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